FILED
MAY 15 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 1005

LEONARD C. EDWARDS,
Petitioner

v.

VELVAC, INC. and WALLER CARSON
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. PRESTON SWECKER
Counsel for Petitioner

Of Counsel:
WILLIAM L. MATHIS
SWECKER & MATHIS

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Rules and Statutes Involved	2
Statement of the Case	3
Argument	5
Conclusion	8
Appendix	
Opinion of District Court, dated October 30, 1956	9
Notice of Appeal to Court of Appeals	16
Motion to Dismiss Appeal	16
Decision of Court of Appeals dated February 25, 1957	17
Motion to Reinstate Appeal	18
Decision of Court of Appeals dated March 27, 1957	18

Index of Decisions

Ackermann v. United States, 340 U.S. 193, 197	5, 7
Callaway v. Wolcott, 90 Cal. App. 753, 266 Pac. 574	6
Commercial Credit Corp. v. United States (C.A. 8), 175 F. (2d) 905	5
Hill v. Hawes, 320 U.S. 520	6
Klapprott v. United States, 335 U.S. 601	5
Lewith v. Remke, 217 Cal. 563, 20 Pac. (2d) 687	6
Moore's Federal Practice (2d Ed.), Vol. 7, page 14	6
Perrin et al v. Aluminum Co. of America (C.A. 9), 197 F. (2d) 254	5
Stenzel v. Kronick, 201 Cal. 26, 255 Pac. 199	6
Tozer v. Charles A. Krause Milling Co. (C.A. 3), 189 F. (2d) 242	5

DARK PAGE BLEED THRU

INDEX (Continued)

PAGE

United States v. Wissahickon Tool Works, Inc. (C.A. 2), 200 F. (2d) 936 5

Vicino v. Amador, 71 Cal. App. 604, 236 Pac. 369 6

IN THE

Supreme Court of the United States

October Term, 1956

No.

LEONARD C. EDWARDS,
Petitioner

v.

VELVAC, INC. and WALLER CARSON
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Leonard C. Edwards, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit, entered on February 25, 1957 and on March 27, 1957, in Appeal No. 11960, in said Court.

OPINIONS BELOW

Neither the Opinion of the District Court nor the Judgments of the Court of Appeals have been reported. They have been included in the record certified to this Court and are included in the Appendix hereto, that of the District Court at page 9, and of the Court of Appeals at pages 17 and 18.

DARK PAGE BLEED THRU

JURISDICTION

The Judgment of the District Court was entered on March 12, 1956. A timely appeal was filed therefrom to the Court of Appeals, which appeal, by Order dated February 25, 1957, was dismissed. A timely Motion was filed thereafter for reinstatement of the appeal, or for that Court to state grounds for dismissal, which Motion was denied on March 27, 1957.

The jurisdiction of this Court is invoked under U.S. Code, Title 28, Section 1254(1), and under Rule 19(1)(b) of the Rules of the Supreme Court.

QUESTIONS PRESENTED

1. Is a denial by the District Court of a motion under Rule 60(b), F.R.C.P., to vacate a final judgment, based on (1) inadvertence or excusable neglect, appealable, and should such decision be reviewed by the Court of Appeals?

2. Was the Court of Appeals justified in dismissing timely appeal from decision of District Court denying motion under Rule 60(b)(1) to vacate final judgment, which motion was filed within period provided by Rule, and in refusing to specify reasons for decision?

3. Is relief afforded under Rule 60(b)(1) where the mistake, inadvertence, surprise or excusable neglect occurred after the final judgment was entered, in perfecting appeal?

RULES AND STATUTES INVOLVED

Federal Rules of Civil Procedure:

"RULE 60. RELIEF FROM JUDGMENT OR ORDER

• • • •

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On Motion and upon such terms as are just, the court may re-

lieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . ."

U. S. Code, Title 28, Section 1291:

"§1291. Final Decisions of district courts

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

California Code of Civil Procedure, Deering, 1937:

"*Relief from judgment taken by mistake, etc.* The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken."

STATEMENT OF THE CASE

This action was filed in the District Court for the Eastern District of Wisconsin, for infringement by the Respondents of a United States patent issued to the Petitioner. After trial, the District Court, on March 12, 1956, entered an Order and Judgment dismissing the Complaint herein. A Notice of Appeal to the Court of Appeals for the Seventh Circuit was filed on April 12, 1956. On Motion made in the Court of Appeals, that Court entered an Order on August 14, 1956, dismissing the appeal as not timely filed.

On August 23, 1956, the Petitioner filed a Motion in the District Court to vacate, under Rule 60 of the Federal Rules of Civil Procedure, amend and reinstate the District Court's Final Order and Opinion. On October 30, 1956, the District Court entered an Order denying that Motion (Appendix, *infra,* page 9).

The Motion had been predicated on both Sections (a) and (b) of Rule 60, asking a clarification of the opinion under Section (a) and to be relieved from the Judgment under Section (b). Only Section (b) was involved in the appeal to the Court of Appeals and it is only that portion of the Motion which is material here.

Accompanying the Motion, affidavits (Appendix, *infra,* pages 19 and 20) were filed in the District Court, establishing that the trial attorney had prepared a timely Notice of Appeal from the Judgment of March 12, 1956, which was transmitted to the associate attorney in Milwaukee for service and filing, but at the time that Notice reached the office of the Milwaukee attorney, within the limit of time for the filing of the same, he was then engaged in the trial of another case, so that the Notice of Appeal did not come to his personal attention until after the close of business on the last day for filing the same, and he failed to file the Notice until the following day, one day late.

A timely Notice of Appeal (Appendix, *infra,* page 16) from the decision of the District Court denying the Motion to Vacate, to the Court of Appeals for the Seventh Circuit. This appeal was dismissed by the Court of Appeals (Appendix, *infra,* page 17).

The Petitioner filed a Motion (Appendix, *infra,* page 18) to reinstate that appeal or to state the grounds for dismissal, which Motion was denied without explanation (Appendix, *infra,* page 18).

ARGUMENT

The Decision of the District Court of October 30, 1956, denied the Motion to Vacate the Judgment of March 12, 1956, upon an interpretation of Rule 60(b)(1), which appears to be in conflict with all applicable decisions and with the plain import and meaning of the Rule.

It is well established that the Decision of a District Court on a Motion to Vacate a Judgment under Rule 60(b) is a final decision under Section 1291 of U.S. Code, Title 28. Under that provision of the Statute, the Court of Appeals had jurisdiction of the appeal, timely filed, from the decision of the District Court on the Motion under Rule 60(b), dated October 30, 1956. This Court has heretofore recognized that such decisions are appealable and subject to review on appeal:

Ackermann v. *United States,* 340 U.S. 193
Klapprott v. *United States,* 335 U.S. 601

Likewise, other Courts of Appeals have reviewed, as final decisions, orders granting or denying a motion under Rule 60(b):

United States v. *Wissahickon Tool Works, Inc.* (C.A. 2), 200 F. (2d) 936
Tozer v. *Charles A. Krause Milling Co.,* (C.A.3), 189 F. (2d) 242
Commercial Credit Corp. v. *United States* (C.A. 8), 175 F. (2d) 905
Perrin et al v. *Aluminum Co. of America,* (C.A. 9), 197 F. (2d) 254

Because the Court of Appeals failed and refused to state any reasons for dismissal of the appeal, it is not definitely known on what basis this appeal was dismissed, but it is clear from all authorities that the matter was appealable and Petitioner should have had an opportunity for review by the Court of Appeals.

Such action by the Court of Appeals appears to bring

this case within the provisions of Rule 19(1)(b) of the Rules of the Supreme Court:

> "(b) Where a court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, . . . as to call for an exercise of this court's power of supervision."

This Court has heretofore held that where there has been delay in the filing of the appeal due to neglect, the judgment should be vacated and reinstated so as to revive the right of appeal. *Hill* v. *Hawes,* 320 U.S. 520. That case involved neglect on the part of the Clerk in failing to notify the attorney of the entry of judgment, and it was not excusable neglect of the parties, but the principle of thus vacating and reinstating the appeal for excusable neglect is thus established.

The precise issue raised by the decision of the District Court with respect to the interpretation of Rule 60(b)(1) has not previously been determined by any Federal Court in reported cases. However, substantially the identical language, as appears in the Rule, was used in the California Statute, Section 473. The California Courts have uniformly held that such language is applicable to inadvertence or excusable neglect in perfecting appeals. *Callaway* v. *Wolcott,* 90 Cal. App. 753, 266 Pac. 574; *Stenzel* v. *Kronick,* 201 Cal. 26, 255 Pac. 199; *Vicino* v. *Amador,* 71 Cal. App. 604, 236 Pac. 369; *Lewith* v. *Remke,* 217 Cal. 563, 20 Pac. (2d) 687).

Inasmuch as Rule 60(b), especially subdivision (1) thereof, was based on Section 473 of the California Code of Civil Procedure (Moore's Federal Practice, Second Edition, Vol. 7, p. 14), the California decisions interpreting the similar language of that Statute may be referred to for a proper interpretation of the language of the Federal Rule adopted in conformity thereto.

Therefore, it appears that the District Court has committed an egregious error in interpreting Rule 60(b), that the matter is fundamental and apparently of first impression in this Court, and should be determined.

In any event, the Court of Appeals was in error in dismissing the appeal because the matter was properly appealable under the Statute, since the Decision of the District Court was a Final Decision.

The Motion to Dismiss had raised the issue of timeliness of the Motion under Rule 60(b), but inasmuch as the record shows that the Motion was filed on August 23, 1956, to vacate a Final Judgment entered March 12, 1956, it was well within the one year limitation applicable to motions under Rule 60(b). *Ackermann* v. *United States,* 340 U.S. 193, 197.

The only other matter raised by the Motion to Dismiss in the Court of Appeals was that the Court of Appeals had already adjudicated the Petitioner's rights by dismissing the previous appeal as not timely filed. The dismissal of the previous appeal was on the ground that the Court of Appeals did not have jurisdiction, and without jurisdiction the matter was not before the Court of Appeals for determination of the merits of the appeal. Consequently, the Court of Appeals could not and did not adjudicate the rights of the Petitioner with respect to the Motion under Rule 60(b).

Petitioner's rights have suffered greviously in this matter. Through inadvertence or excusable neglect of his counsel, he was denied review of the decision of the District Court on his cause of action. When he petitioned under the Rule to correct that error, his petition was denied, on a question of law. The Court of Appeals has refused to review that decision. It is submitted that such action was without justification.

Under the circumstances here involved, it is respectfully submitted that in all fairness to the Petitioner, the

Court of Appeals should have, at least, stated its reasons for dismissing the appeal, not only as an aid to the Petitioner, but for the benefit of this Court in determining the present question. Consequently, the provision of Rule 19(1)(b) of this Court would indicate that the Court would be justified in exercising its power of supervision in the interest of accomplishing justice to the Petitioner and in affording Petitioner an opportunity to present and to have determined by the Appellate Court the question of compliance with a reasonable interpretation of Rule 60(b).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

J. PRESTON SWECKER
Counsel for Petitioner

Of Counsel:
WILLIAM L. MATHIS
SWECKER & MATHIS

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 5764

LEONARD C. EDWARDS,
d/b/as Edwards Air Hose Bracket Company,
Sapulpa, Oklahoma,
Plaintiff,

v.

VELVAC, INC., and WALLER CARSON
3530 West Pierce Street
Milwaukee, Wisconsin
Defendants.

OPINION

Plaintiff has filed with this court a motion to vacate, amend and reinstate its final order and opinion of March 12, 1956 (reported at 140 F. Supp. 936). He relies on Federal Rules of Civil Procedure, Rule 60(a) relating to Clerical Mistakes, and Rule 60(b) providing for relief from Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc., and asks that the findings of fact contained in the opinion be amended in two respects:

> "1. State whether the 'triangular bracket, old in the art', referred to on page 8 of the Court's Opinion, is the same as the hose bracket for tractors referred to in the depositions described on page 4 of that same Opinion; and
>
> 2. State whether the 'aggregation', referred to in the last paragraph on page 8 of the Court's Opinion, is the aggregation of the triangular bracket referred to in the depositions, with a spring, which the Court

also found to be old in the art, according to the paragraph next before the last on page 8 of the Court's Opinion."

It should be emphasized at the outset that this is not a case where the moving party has not had his day in court. After issue was joined, the matter was fully pretried, and after the provisions of the pre-trial order had been complied with, the matter was called up for trial. No suggestion has been made in this case that in the two days afforded for trial, both sides did not have adequate opportunity to present all their proofs. After all of the evidence was in, substantial time was allowed for the filing of briefs. After careful study of the transcript of testimony and the briefs submitted, this court filed a written twenty-page opinion which stands as the findings of fact and conclusions of law in this case, and ordered dismissal of the action on its merits. On the same day, copies of the opinion and order of this court were mailed to the attorneys for the parties pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. No issue is raised that the notices so mailed were not promptly received by the parties.

We believe it reasonable to infer both from his failure to avail himself of his rights to move within the time limits of appropriate rules for a new trial or amendment of the judgment, and from his subsequent course of action, that plaintiff determined to seek his further relief in the Court of Appeals and not in the trial court.

In prosecuting his appeal, however, plaintiff-appellant did not file his notice of appeal with the District Court until April 12, 1956, which was one day late in complying with the provisions of Rule 73(a). In this respect it should be observed that no application was made to the trial court for enlargement of the thirty-day period upon the sole ground allowable under that rule, towit, upon a showing of "excusable neglect based on a failure of a party to learn of the entry of the judgment."

On or about July 31, 1956, defendants filed a motion before the United States Court of Appeals for the Seventh Circuit to dismiss the appeal herein on the ground that the notice of appeal was not filed within the time fixed by Rule 73(a) of the Federal Rules of Civil Procedure, that is, within thirty days from the entry of the final order dismissing the plaintiff's action. By answer of August 9, 1956, with supporting affidavit of August 7, 1956, presented before that court, the plaintiff opposed the defendants' motion to dismiss the appeal. The supporting affidavit set forth the reason for the late filing of the notice of appeal, it being occasioned by the fact that plaintiff's Milwaukee counsel was engaged in a jury trial on April 11, 1956, and plaintiff's Washington D. C. counsel's air mail letter of April 9, 1956, with notice of appeal enclosure did not come to his personal attention until after the close of the working day on April 11, 1956. The Milwaukee attorney thereupon filed it on the morning of April 12, 1956, thirty-one days after the final order of this court.

The United States Court of Appeals for the Seventh Circuit in its Mandate dated August 14, 1956, dismissed the plaintiff's appeal as not timely made, it not appearing that the plaintiff had applied for or obtained an extension of time.

Shortly thereafter, and on August 23, 1956, the plaintiff filed with this court his motion to vacate, amend and reinstate, hereinbefore described.

The conclusion is inescapable that the plaintiff has now turned to this District Court in a last desperate effort to qualify his case for review before the Court of Appeals. It is obviously his purpose and hope by means of the motion before us to persuade this court to vacate the order, make certain "clarifying amendments" to the findings of fact contained in the opinion and then enter a new order of dismissal. Since the net result of this whole operation proposed by plaintiff is, admittedly and at best,

a correction of alleged clerical errors, we can only conclude that he assumes that a new thirty-day period will commence to run as of the date of the re-entered order within which he may take his appeal.

We recognize that the plaintiff finds himself in a difficult and embarrasing plight, and while we would ordinarily be sympathetic, that plight does not justify a warped and distorted application of Rules 60(a) or 60(b) or any rule of the Federal Rules of Civil Procedure.

It is apparent from plaintiff's opening memorandum filed shortly after the motion that he regards the matters, wherein he asks for amendment or clarification, as clerical mistakes or errors arising from oversight or omission from which relief can be had under the following rule, 60(a):

> "(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."

It is difficult to treat seriously plaintiff's motion for "clarifying amendments" to the findings of fact. Counsel himself apparently recognizes the insubstantiality of his position by having accorded it only the most passing reference in his memoranda and oral argument. The only references made by him in his two memoranda are the following:

First Memorandum (Concluding Paragraph):

> "While doing so, it is respectfully suggested that the meaning of the Court's Opinion would be clarified in the two particulars mentioned on page 8 thereof, if it be made clear that the triangular bracket, old in

> the art, is the same hose bracket referred to in the depositions, and also in the holding with respect to 'aggregation', that it is the hose bracket which the Court found to be old according to the depositions, combined with the spring which the Court also found to be old. These points would clarify the meaning, it is submitted, *which the Court apparently intended.*" (Underlining ours.)

Second Memorandum (Concluding Paragraphs):

> "While the motion refers to the amendment of the Findings of Fact, this is not a motion under Rule 59 for major changes in the Findings of Fact. It is a motion under Rule 60(a) for the correction of clerical mistakes, merely the identification of the parts referred to, *which it is quite apparent the Court evidently intended.* (Underlining ours)
>
> That sort of mistake can be corrected at any time. There is no limitation thereon according to the Rule. The Court would be justified, it is believed, in withdrawing the Judgment and Findings of Fact to correct such formal errors for clarification."

Where the intention of the court is "evident" and "apparent" as is here acknowledged by counsel, no grounds exist for amendment under Rule 60(a). The motion for relief in respect to Rule 60(a) is denied.

The contention presented in plaintiff's first memorandum that Rule 60(b) had some application in this case was completely unsupported in that this court was offered no instance of "mistake, inadvertence, surprise, or excusable neglect," or anything of any nature either in the form of affidavit or by reference to any portion of the record before this court or the Court of Appeals to justify the use of this rule. Several weeks later, however, on September 28, 1956, the plaintiff, in an apparent attempt to supply grounds for the invocation of Rule 60(b) filed an affidavit relating to efforts of Washington and local counsel to file the notice of appeal. This affidavit was substantially to the same effect as the affidavit

dated August 7, 1956, filed in the Court of Appeals, by the plaintiff in opposition to defendants' motion for dismissal of the appeal.

It is apparent from the substantially more extended treatment given on oral argument and written memoranda, that the plaintiff places greater, if not total reliance on this second contention that he is entitled to relief under Rule 60 (b)(1) and (6). His position in this respect is as devoid of merit as his first contention. Rule 60 (b)(1) and (6) in the respects urged, provides that:

> " . . . the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment."

It should be emphasized at the outset that the express purpose of Rule 60(b) is to provide the court with the means of *relieving* a party from the oppression of a final judgment or order upon a proper showing. Plaintiff's motion is in no wise in accord with this fundamental purpose. While he does move that the final order be vacated and amended, he also asks that that identical final order be reinstated. In other words, the burden of the final order or judgment would still be in operation.

Plaintiff has specified but two respects in which he asks for amendment of the findings of fact. He himself has minimized them as "clerical errors" correctible under Rule 60(a), and we have accordingly dealt with them under such section. The most favorable intendment under the confused state of the pleadings that we can give him is that he also urges that these self-styled "clerical error" amendments be made under Rule 60(b), if leave is denied under Rule 60(a). Even if such relief were to be given, and the final order were reinstated, the burden of that final order would be unrelieved and the foundation upon which it rests—the findings of fact in the opinion—would be mate-

rially unchanged. It would seem unnecessary to observe that unless the purpose for which the rule was enacted can be achieved, it should not be employed. The plaintiff does not and cannot point to any instance of mistake, inadvertence, surprise or excusable neglect, the happening of which resulted in the entry of the judgment from which he asks relief. The only act or omission which is urged as an instance of excusable neglect or inadvertence is one which relates solely to an essential step in the appeals procedure. While Rule 60(b)(1) does not expressly say that a showing must be made that the final judgment, order, or proceeding was entered because of mistake, inadvertence, surprise, or excusable neglect, it appears to us implicit under the rule. Since it clearly appears that plaintiff does not in reality seek the relief to be afforded by 60(b), and obviously cannot demonstrate a relevant instance of excusable neglect, his motion in this respect must be denied.

Rule 60(b) and its counterparts in state statutes, have proven themselves to be valuable, equitable and humane discretionary powers by which courts have been able to relieve the oppressed from the burden of judgments unfairly, fraudulently or mistakenly entered. To use Rule 60(b) for the purpose of circumventing another rule, in this case Rule 73(a), would be a perversion of the rule and its purpose.

Whether the grant of the relief asked for here—vacation, amendment and reinstatement of the final order or judgment—would in a meritorious case have the effect of establishing new limits within which to file notice of appeal was not presented and it not decided.

Plaintiff's motion to vacate, amend and reinstate this court's final order of March 12, 1956, is denied.

Dated, Milwaukee, Wisconsin, this 30th day of October, 1956.

ROBERT E. TEHAN
U. S. District Judge

• • • •

NOTICE OF APPEAL TO COURT OF APPEALS

Notice is hereby given that Leonard C. Edwards, d/b/a Edwards Air Hose Bracket Company, Plaintiff, hereby appeals to the Court of Appeals for the Seventh Circuit from the final Order of this Court, entered herein on October 30, 1956, in the above-entitled action, denying Plaintiff's Motion to Vacate, Amend and Reinstate its Final Order and Opinion of March 12, 1956.

• • • •

MOTION TO DISMISS APPEAL

Appellees, Velvac, Inc. and Waller Carson, move the court to dismiss the plaintiff-appellant's appeal herein from the order of this United States District Court for the Eastern District of Wisconsin entered on October 30, 1956, denying plaintiff's motion to vacate, amend and reinstate its final order of March 12, 1956, on the grounds that plaintiff-appellant's motion was not timely made and that the United States Court of Appeals for the Seventh Circuit as already adjudicated the plaintiff-appellant's rights when on October 14, 1956, it dismissed the plaintiff-appellant's appeal from the United States District Court's final order which dismissed plaintiff's complaint on the grounds that the plaintiff-appellant had not filed its notice of appeal within time fixed by Rule 73(a) of the Federal Rules of Civil Procedure.

Dated February 8, 1957.

• • • •

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago 10, Illinois

February 25, 1957

Before

Hon. F. RYAN DUFFY, CHIEF JUDGE
Hon. WALTER C. LINDLEY, CIRCUIT JUDGE

No. 11960

LEONARD C. EDWARDS, d/b/a
EDWARDS AIR HOSE BRACKET COMPANY,
Plaintiff-Appellant

v.

VELVAC, INC., WALLER CARSON
and H. R. SALTER,
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Wisconsin.

On consideration of the motion of Velvac, Inc. and Waller Carson, defendants and appellees, that the appeal to this Court by Leonard C. Edwards, d/b/a Edwards Air Hose Bracket Company, plaintiff and appellant, from the order of the United States District Court entered on October 30, 1956 be dismissed, the answer thereto of plaintiff-appellant, and the briefs of counsel for the parties, the Court being fully advised in the premises,

IT IS ORDERED, that said motion to dismiss said appeal be, and the same hereby is, granted, and that said appeal be, and the same hereby is, dismissed.

* * * *

MOTION TO REINSTATE APPEAL OR STATE THE GROUNDS FOR DISMISSAL

Now comes the Plaintiff-Appellant in the above-entitled cause, and moves the Court for an Order to vacate the Order dated February 25, 1957 and to reinstate this appeal, which was ordered dismissed thereby, or to state the grounds for dismissal of the appeal.

* * * *

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago 10, Illinois

March 27, 1957

Before

Hon. F. RYAN DUFFY, CHIEF JUDGE
Hon. WALTER C. LINDLEY, CIRCUIT JUDGE

No. 11960

LEONARD C. EDWARDS, d/b/a
EDWARDS AIR HOSE BRACKET COMPANY,
Plaintiff-Appellant

v.

VELVAC, INC., WALLER CARSON
and H. R. SALTER,
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Wiconsin.

On March 12, 1956 the District Court for the Eastern District of Wisconsin entered an order and judgment

dismissing the complaint herein. A notice of appeal to this Court was filed by plaintiff in the District Court on April 12, 1956. On motion duly made this Court, on August 14, 1956, entered an order dismissing the appeal as not timely filed. On August 23, 1956 plaintiff-appellant filed a motion in the District Court to vacate, amend and reinstate the District Court's final order and opinion, asserting that said motion was based upon Rules 60(a) and 60(b) Federal Rules of Civil Procedure. On October 30, 1956 the District Court entered an order denying the motion to vacate, amend and reinstate. Plaintiff appealed to this Court from that order. On motion duly made this Court, on February 25, 1957 entered an order dismissing said appeal. On March 6, 1957 plaintiff-appellant filed in this Court a "motion to reinstate appeal or state the grounds for dismissal." Plaintiff's attorney filed a brief supporting said motion. On October 13, 1957, defendants-appellees filed an answer, which answer incorporated a citation of authorities. On March 14, 1957 plaintiff-appellant filed a motion for leave to file a reply memorandum.

IT IS ORDERED:

1) Leave is granted for plaintiff to file the proffered reply memorandum;

2) The motion of plaintiff-appellant to reinstate its appeal or for this Court to state grounds for dismissal be and the same is hereby denied.

INDEX

	Page
Question Presented	1
Rules Involved	2-3
Argument	3-5

TABLE OF CASES

Bowman v. Bowman, 178 P. 2nd 751, 29 Cal. 2d 808	4
Deena Products Co. v. United Brick & Clay Workers of America, C.A. Ky., 1952, 195 F. 2d 612, Certiorari Denied 73 S. Ct. 21, 344 U.S. 822, 97 L. Ed. 640	5
Hill v. Hawes, 320 U.S. 520	3
Principale v. Associated Gas & Electric Co., C.A. N.Y., 1951, 192 F. 2d 1016, Certiorari Denied 72 S. Ct. 1034, 343 U.S. 942, 96 L. Ed. 1347	5
Ray v. Morris, C.A. Ill., 1948, 170 F. 2d 498	5
Slater v. Peyser, 91 U.S. App. D.C. 314, 1952, 200 F. 2d 360	5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No.

LEONARD C. EDWARDS,
Petitioner,

v.

VELVAC, INC. and WALLER CARSON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Can Rule 60(b) F.R.C.P. be used after trial to relieve Petitioner from a final judgment duly entered when the only alleged inadvertence or excusable neglect was Petitioner's failure to file a timely notice of appeal pursuant to Rule 73(a)?

RULES INVOLVED

Federal Rules of Civil Procedure:

"RULE 60. RELIEF FROM JUDGMENT OR ORDER

* * * *

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On Motion and upon such terms as are just, the court

may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . ."

"RULE 73. APPEAL TO A COURT OF APPEALS

"(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed."

"RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

* * * *

"(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

"RULE 6. TIME.

* * * *

"(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period orig-

inally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59 (b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them."

ARGUMENT

After trial, Petitioner filed his Notice of Appeal late. Petitioner is attempting to use Rule 60(b) to circumvent the appeal time requirement of Rule 73(a) by having the judgment vacated and reinstated in essentially the same form. The District Court recognized this attempt. Clerical errors or failure to receive timely notice of entry of judgment are not involved in this case. Neither this Court nor any other Federal Court has ever held that where there has been a delay due to neglect in filing a Notice of Appeal, the judgment should be vacated and reinstated so as to revive the right of appeal. *Hill v. Hawes,* 320 U.S. 520, the sole Federal case cited by the Petitioner in support of his argument, is not in point since judgment was vacated not under the provisions of Rule 60(b), but under the only exception to the thirty-day requirement of Rule 73(a), excusable neglect based on a failure to learn of the entry of judgment.

Rule 73(a) specifically limits the time for filing a Notice of Appeal to thirty days after entry of judgment and provides no exception that can be used in the case before the court. Rule 59(e) allows only ten days after entry of judgment in which to move to amend or alter a judgment. Rule 6(b) provides that the time requirements of Rule 73(a) and 59(e) can not be enlarged.

These rules should not be circumvented by a misuse of Rule 60(b). Rule 60(b) provides that a court "may relieve" a party from the oppression of a final judgment upon a proper showing. Petitioner's motion, while it did move that the final judgment be vacated and amended, also asked that an identical judgment be reinstated. The burden of the final judgment would still be in operation.

Petitioner claims that no Federal Court has ever decided the question presented. It is obvious that the rules above set forth are so clear that no judicial interpretation is needed. Respondent's attorneys have checked to the best of their knowledge all cases where judgments have been vacated by excusable neglect, mistake, inadvertence or surprise under Rule 60(b). In all cases where the judgment was vacated, the judgment was a default judgment or the action had been dismissed without having been tried. No case could be found where the judgment was vacated after an action had been tried and the Notice of Appeal had been filed late.

Petitioner further claims that the California Supreme Court's interpretation of Section 473, California Statutes, which Petitioner claims is similar to Rule 60(b) F.R.C.P. is favorable to Petitioner's argument. However, none of the California cases cited by the Petitioner on page 6 of his brief involves the late filing of a Notice of Appeal. The procedural defects in these California cases involved either certification of transcripts, insufficient records before the court, or reliance upon defective orders. No California case can be found vacating a judgment after the case had been tried on its merits and a Notice of Appeal was not filed on time. In *Bowman v. Bowman,* 178 P. 2nd 751, 29 Cal. 2d 808, the Court held that the purpose of Section 473, California Statutes, in authorizing relief from a judgment, etc., taken through mistake,

inadvertence, surprise or excusable neglect was to enable a party to proceed on merit.

Under Rule 73(a) F.R.C.P., the court loses jurisdiction when a Notice of Appeal is filed late. The cases are clear that failure to take an Appeal within the time prescribed is jurisdictional and mandatory and the prescribed time cannot be extended by waiver or order of court.

Deena Products Co. vs. United Brick & Clay Workers of America, C.A. Ky., 1952, 195 F. 2d 612, Certiorari Denied 73 S. Ct. 21, 344 U.S. 822, 97 L. Ed. 640.

Principale vs. Associated Gas & Electric Co., C.A.N.Y. 1951, 192 F. 2d 1016, Certiorari Denied 72 S. Ct. 1034, 343 U.S. 942, 96 L. Ed. 1347.

Slater vs. Peyser, 91 U.S. App. D.C. 314, 1952, 200 F. 2d 360.

Ray vs. Morris, C.A. Ill., 1948, 170 F. 2d 498.

It is respectfully submitted that the petition for writ of Certiorari should be denied and that Respondents be awarded their costs.

Respectfully submitted,

IRA MILTON JONES,
Counsel for Respondents,
Velvac Inc. and Waller Carson,
110 E. Wisconsin Ave.,
Milwaukee 2, Wis.

Of Counsel:
IRVING A. PUCHNER,
WILLIAM E. SHAW.